R & I SECURITIES SDN. BHD.

v.

SYKT. TANAMAN & PERUSAHAAN PERAK SDN. BHD.

HIGH COURT MALAYA, JOHOR BAHRU
LC VOHRAH J
[CIVIL SUIT NO. 277 OF 1979]
5 MAY 1988

LAND LAW: *Caveat - Extension - Procedure - Charge not registered - Caveatable interest - Section 323(1) of National Land Code.*

The plaintiff was a stockbroker and the defendant was a company wholly owned by one Mosbert Berhad. An arrangement was entered into whereby the plaintiff was to sell shares in Mosbert Berhad to Patel Holdings Sdn. Bhd. which in turn was to sell the shares at an enhanced price to a company in Hong Kong known as Hong Kong Securities Limited. Pursuant to this arrangement some shares were sold and to secure the re-purchase by Hong Kong Securities Ltd. the plaintiff obtained a resolution from the defendant to create a charge over some land but the charge was never registered because the consent of the first chargee could not be obtained. The plaintiff, to protect itself, lodged a caveat. The plaintiff later obtained an order to extend the caveat.

The defendant then filed in this application to discharge the order granted for the extension of caveat.

Held:
There was a clear intention to create a second charge. Therefore it would appear that the plaintiff has a right in equity to a registrable interest in the said land. However the second charge was created pursuant to an agreement made more than 12 years ago and no action has been filed to specifically enforce the agreement so that limitation has set in to bar the plaintiff from enforcing any rights, legal or equitable, it might have under the agreement.

[Defendant's application allowed.]

Cases referred to:
Eng Mee Yong & Ors. v. V. Letchumanan [1979] 2 MLJ 212
Inter-Continental Mining Co. Sdn. Bhd. v. Societe Des Etains De Bayas Tudjuh [1974] 1 MLJ 145
Krishna Kumar v. United Malayan Banking Corporation Bhd. [1983] 1 MLJ 165

Legislation referred to:
National Land Code 1965, ss. 323(1), (a), (b)

For the defendant/applicant - A.I. Raj; M/s. Raj Selva & Co.
For the plaintiff/respondent - Upali Masacorale; M/s. Jackson & Masacorale

JUDGMENT

LC Vohrah J:

This is an application on the part of the defendant by way of a summons-in-chambers to discharge an order granted on 16 December 1981 in Originating Summons No. 371 of 1981 extending a caveat lodged on 24 December 1975 in respect of land held under H.S. (D) L.P. 36/73 for Lot No. 11665 containing an area of 5024.7403 acres in the Mukim of Durian Sebatang, District of Hilir Perak, in the State of Perak ("the said land") until the final disposal of this suit or its earlier withdrawal by the plaintiff.

The brief facts forming the background of this application are as follows. The plaintiff carried on business as a stock-broker at No. 65, Jalan Tan Hiok Nee, Johor Bahru. The defendant at the relevant time was a company wholly owned by Mosbert Berhad whose directors were also the directors of the defendant and it carried on business next door to the plaintiff's business premises at No. 66. An arrangement was entered into whereby the plaintiff was to sell shares in Mosbert Berhad to Patel Holdings Sdn. Bhd. which in turn was to sell the shares at an enhanced price to a company purportedly registered in Hong Kong known as Hong Kong Securities Limited. Pursuant to this arrangement the plaintiff on 27 May 1975 sold 1,100.000 shares in Mosbert Berhad to Patel Holdings Sdn. Bhd. at a price of RM699,188 which sum Patel Holdings Sdn. Bhd. paid in full. On 28 May 1975 Patel Holdings Sdn. Bhd. sold to the plaintiff the same shares at the enhanced price of RM752,735, delivery to be made on 28 August 1975. This delivery date was subsequently deferred to 28 November 1975. In order to secure the re-purchase by Hong Kong Securities Limited before the deadline, the plaintiff sought and obtained a resolution from the defendant to create a charge (See Exhibit '1D1', Encl. 16) which resolution was conveyed in the defendant's undated letter to United National Finance Bhd., the first chargee, for the purpose of obtaining the release by the first chargee of the issue document of title to the appropriate land registry in contemplation of the registration of the second charge (See Exhibit '1D2', Encl. 16). A charge instrument was apparently drawn up by the defendant in favour of the plaintiff in respect of the said land (See Exhibit 'WCK3', Encl. 12) but it could not be or was never registered because the consent of the first chargee could not be obtained and also because of the restriction in interest requiring the prior approval of the Menteri Besar of Perak for the creation of a charge which approval had not been obtained. As Hong Kong Securities Ltd. did not take up the shares, Patel Holdings Sdn. Bhd. filed an action against the plaintiff in Penang Civil Suit No. 606 of 1977 for the failure and/or refusal to take delivery of the shares in consequence of which the plaintiff to protect itself lodged the caveat on 24 December 1975 and later on 21 August 1979 filed the present suit to recover the amount for these shares and other amounts in respect of other shares altogether totalling RM1,999,570.27.

A preliminary objection was raised by Counsel for the plaintiff to the effect that the present application for removal of the caveat was wrongly brought by summons-in-chambers in the present suit because the caveat having been extended in an application by way of an originating process i.e. Originating Summons No. 371 of 1981 in respect of a caveat which had been lodged 4 years before the present suit was filed, any subsequent application to set aside the order that had been granted for the extension should have been made by a summons-in-chambers in that particular originating summons or by way of another originating process. I overruled the objection as the application for the extension of the caveat by the plaintiff in Originating Summons No. 371 of 1981 had in fact been made *ex-parte* so that the defendant would not necessarily in the normal course of events have known of the application by originating summons and as, more importantly, the whole basis for the plaintiff making the *ex-parte* application for the extension of the caveat, as stated in para. 6 of the affidavit in support (See Encl. 2), was the subsistence of the present suit which had specifically been filed for the purpose of providing the necessary security for the recovery of the sum claimed therein. I was more than satisfied that the defendant had shown sufficient nexus between the continuance of the caveat and the existence of the present suit to justify its taking out a summons-in-chambers in the present suit itself in order to discharge the order extending the caveat.

As to the substance of the application, the sole question that has to be determined is whether the plaintiff's interest in the said land is of such a nature as to entitle it to caveat it under the relevant provisions of s. 323(1) of the National Land Code. Those provisions read:

(1) The persons and bodies at whose instance a private caveat may be entered are:

(a) any person or body claiming title to, or any interest in, any alienated land or any right to such title or interest;

(b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and

(c) the guardian or next friend of any minor claiming to be entitled as mentioned in para. (b).

Counsel for the plaintiff concedes that on the authority of *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 MLJ 212 the onus is upon the plaintiff to show that it has a caveatable interest and contends that although the plaintiff's claim in the present action is purely for a liquidated sum, that sum was secured by the charge instrument WCK3 which *per se* and despite its want of registration conferred upon the plaintiff a right to a registrable interest thus entitling it to caveat the said land. In support of this contention, Counsel referred to *Inter-Continental Mining Co. Sdn. Bhd. v. Societe Des Etains De Bayas Tudjuh* [1974] 1 MLJ 145. In that case, according to the headnote, the appellant had obtained a permit to mining land, of which the respondent was the lessee. Owing to heavy losses sustained in the mining operations, it was mutually agreed that the land should be given to a third party to work on a sublease on payment of a premium. The respondent negotiated with a third party and offered it options for a sublease. There were differences of opinion between the appellant and the respondent as to the terms of the offer to the third party and in order to protect its rights under its agreement with the respondent, the appellant lodged a caveat against the land. The respondent applied for an order to remove the caveat against the land and the application was granted by the High Court. The appellant appealed to the Federal Court which held, allowing the appeal, that the agreement was in substance a sublease, though not in the statutory form and equity would treat it as an agreement for a sublease and specifically enforce it and that the appellant therefore had a right in equity to a registrable interest in the land, and thus had a caveatable interest under ss. 323(1)(a) and 323(1)(b) of the National Land Code. Counsel contended that because the charge instrument had been executed in the proper form i.e. Form 16A as prescribed by the National Land Code pursuant to the resolution ID1 passed by the defendant's Directors authorising the creation of a second charge on the said land and confirmed by the letter ID2 from the defendant to United National Finance Bhd. requesting the release of the issue document of title "in order to facilitate the registration of the second charge", WCK3 constituted a contract which conferred a right to a registrable interest enabling the plaintiff to lodge the caveat. In support of his contention Counsel referred to the case of *Krishna Kumar v. United Malayan Banking Corporation Bhd.* [1983] 1 MLJ 165. In that case Krishna Kumar (K.K.) gave Malaysian Borneo Finance Corporation Berhad (MBF) a first charge on his land on 27 December 1976. But around June 1976 three companies of which K.K. was the managing director had obtained loans from the bank and these companies later defaulted in their repayments. K.K. and the three companies in consideration of United Malayan Banking Corporation Bhd. (UMBC) forbearing to sue them for recovery of the loans agreed to provide additional security in the nature of a second charge on the land conditional upon and subject to the consent of MBF, the first chargee. MBF granted conditional consent on 31 October 1977 and the relevant second charge

documents were signed by K.K. and sent by UMBC's solicitors to MBF for their consent on 25 October 1978. MBF refused to grant consent for the creation of a second charge in favour of the UMBC for the reason, *inter alia*, that UMBC had delayed in sending the second charge instruments. On 8 May 1979 UMBC proceeded to register a private caveat on the land and on 12 November 1979 it sued the three companies and K.K. for the outstanding loans on these civil suits. On 12 February 1982 UMBC applied for and obtained an order that the private caveat be extended until the final disposal of the three suits. K.K. applied to set aside the order and for the removal of the private caveat. On dismissing K.K.'s application Gunn Chit Tuan J had this to say at p. 108:

> In this case, the applicant as well as his three companies had already executed the relevant charge as well as a supplementary security agreement and although the bank has not signed the said agreement, it could do so at any time and there was therefore in this case not only an agreement but also in my view an instrument of charge in registrable form. The fact that MBF had not endorsed its consent on an annexure to the said charge which might therefore not be accepted by the relevant administrative authorities, did not in my view detract from the fact that it is an instrument of charge in registrable form and that even if the relevant authorities had refused to accept it for registration, nevertheless the bank had in my judgment a registrable interest in the said lands within the meaning of s. 323(1)(a) of the National Land Code 1965.

In view of the undisputed fact that there was a clear intention on the part of the defendant and that of the plaintiff for a second charge to be created for the purpose of securing payment by Hong Kong Securities Limited to the plaintiff for the sale of the shares in consequence of which WCK3 was duly executed, it would at first sight appear that the plaintiff on the authority of *Krishna Kumar's* case (*supra*) has a right in equity to a registrable interest in the said land within the meaning of s. 323(1)(a) of the National Land Code. It is however also not in dispute that the second charge was to be created pursuant to an agreement (appearing as an annexure to the inchoate charge instrument) made more than 12 years ago and that no action has ever been filed to specifically enforce the agreement so that limitation has set in to bar the plaintiff from enforcing any rights, legal or equitable, it might have had under the agreement. In the result I would make an order in terms of the defendant's application that the order dated 16 December 1981 extending the caveat be discharged and that the caveat Presentation No. 573/75 Vol. 74 Folio 76 be removed and that the costs of this application be paid by the plaintiff in any event.

Also found at [1988] 2 CLJ 107